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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

GEORGE HERRERA, Plaintiff and Respondent, v. ANDRE BOHBOT et al., Defendants and Appellants.	B209535 (Los Angeles County Super. Ct. No. BC367015)

APPEAL from a judgment of the Superior Court of Los Angeles County. Malcolm Mackey, Judge. Affirmed.

Bohbot & Riles, Karine Bohbot, Elizabeth L. Riles for Defendants and Appellants.

Law Office of K. M. Neiswender, Kate M. Neiswender for Plaintiff and Respondent.

Andre Bohbot, Dan Bohbot, and Bohbot & Son LLC ("the Bohbots") appeal from a judgment entered in favor of George Herrera, on his complaint against them and on their cross-complaint against him. We affirm.

FACTS

Background

This is a property dispute between neighbors. These are the relevant facts:

In 2001, Herrera bought the property at 6625 Elgin Street in Los Angeles. The property is on a hill, with the house toward the bottom of the slope. In 2004, the Bohbots bought an adjacent property on North Avenue 66. The Bohbot property, which is mostly flat, is at the back of Herrera's property. There was a chain link fence between the properties, but, unbeknownst to the parties when the events leading to this case began, the fence was not on the property line. Instead, some of the land on the Bohbot side of the fence was actually part of the Herrera property. In addition, a guest house on the Bohbot property encroached onto the Herrera property by several feet, as did some concrete hardscaping around the pool.

In February of 2007, after some discussion between the parties, and, in Herrera's view, several trespasses by the Bohbots, Herrera filed this suit for trespass, nuisance, quiet title, and an injunction requiring the Bohbots to remove the encroaching structure. The Bohbots' answer raised the defense of adverse possession. They also cross-complained for quiet title and declaratory relief, seeking an order that they were the owners in fee simple of the disputed property.

Trial was to the court, which found for Herrera on his causes of action for trespass and quiet title, and against the Bohbots on their affirmative defense of adverse possession and on the causes of action in their cross-complaint. However, after balancing the hardships, the court denied Herrera's request for an injunction.

The evidence at trial

The parties stipulated that a survey conducted by Raymundo Lombera correctly reflected the boundaries.

Herrera's case

Through his own testimony and that of Lombera, arborist and civil engineer Kay Greeley, and property inspector Michael Owdeh, Herrera presented evidence that the fence included old fencing, about four feet high, and taller new fencing, and that the old fence was more than ten years old and the new fence was less than ten years old. The corner posts of the fence were in the correct location, but the fence bowed out in the middle. This put an oak tree which belonged to Herrera on the Bohbot side of the fence, and also gave more room to the building encroachment. There was some evidence that the old and new fences overlapped. Herrera testified that the fence had been "pushed out" with a new fence pole in order to give more room to the encroachment, and that there was new fencing around the encroaching guest house. He also testified that in October 2005, he saw a 4 foot fence post lying on the ground, with cement still attached to it.

Concerning the trespass, Herrera presented evidence that when he bought the property, the uphill portion was full of trees and plants and the fence was obscured by vines and bamboo. However, in April of 2005, he observed cut branches near the fence. He believed that the Bohbots had cut the branches, because they had been cutting trees in the area and because no one else had access to the area. He left a note for the Bohbots asking them to clean up the debris, and Bohbot employees later apologized and cleared the branches.

Then, in early October 2005, Herrera observed that a lot of the bamboo adjacent to the fence had been cut. Most of the damage was on his side of the fence. Herrera also saw that drainage pipes had been installed, running from the Bohbot side of the fence to the Herrera side. Concrete residue had drained onto the Herrera side. Herrera elicited evidence from Dan Bohbot that in December 2005, the Bohbots installed sprinklers and

concrete hardscape around their pool, which was near the fence, and that the drainage pipes were installed about that time.

Also in October, the Bohbots removed an oak tree on their side of the fence. Later, they severely and improperly pruned a larger oak tree on Herrera's property.

On October 22, Herrera observed a big hole in the fence which had not been there previously. He testified that on that day, he had a conversation with Andre Bohbot, in which he, Herrera, said that he was going to put up a new fence, and Bohbot suggested that the two should split the cost of a survey and put a fence on the property line. Andre Bohbot also indicated that property on the Herrera side of the fence belonged to the Bohbots, and said that he was not trying to steal Herrera's property.

At some point in October, Herrera sent the Bohbots certified letters asking them to remove the drainage pipes. The letters were returned unopened.

Surveyors were at the site on December 15. Herrera testified that after the surveyor put in stakes, the Bohbots installed sprinklers right up to the fence posts. He also presented evidence that the Bohbots pruned the oak tree again in April 2007, causing even more damage to that tree.

Herrera introduced many photographs into evidence and called other witnesses on some of these points. Their testimony was similar to his. In particular, Greeley testified that in January of 2006 she observed that at the upper portion of the Herrera property, plant material, including bamboo, lantana, and cape honeysuckle, had been cut back. It had been at least three months since the plants were cut, and the bamboo had not grown back, indicating that it had been treated with a herbicide. A small oak tree had been cut down and a larger oak had been heavily and improperly pruned, seriously damaging the tree.

On damages, Herrera presented evidence from Greeley, who testified to the cost of replanting, the erosion damage caused by the Bohbots' drainage pipes and irrigation and the removal of the plants, and to the damage done to the large oak tree through improper pruning. She recommended various corrective measures and calculated the cost of those

measures at $10,378, plus the jute mesh Herrera had already installed. Herrera testified that prior to the time the drainage pipes were installed, he had no problems with landslides or falling rocks, and after that time, he did, and that the jute mesh had cost $1,800.

During cross-examination, Andre Bohbot testified that based on statements made by his real estate agent when he bought the property, he believed that his property extended beyond the fence. Also on cross-examination, Dan Bohbot was questioned about his declaration at summary judgment in which he declared that "we were informed by our real estate agent" that the property line might extend a few feet beyond the fence.[1] Dan Bohbot testified that he was not concerned about this. The land beyond the fence was very steep, and he did not want it.

The Bohbots' case

Through the testimony of Dan Bohbot, Andre Bohbot, architect John Byram, called as an expert, the daughter of the previous owner of the Bohbot property, and other witnesses, the Bohbots presented evidence that the fence had been in the same place, intact, for at least ten years. The Bohbots had not moved the fence or changed it except to patch holes, and had not made holes in the fence. They never removed foliage from the Herrera side of the fence, but only from their own side.

They also presented evidence that the guest house had encroached since it was built in the 1950s.

Patricia Murray-Turner testified that her parents had owned the Bohbot property from 1981 to 2001, and she had spent time there over the years. When her family bought the property, a low fence stretched across the back of the property. They had added a taller fence which "meshed in" with that fence. The fence was still in the same place at

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[1] The agent, Venus Martinez, testified that she did not believe that she had ever told the Bohbots that the property extended past the fence line, although she also testified that it was possible that she did say it.

the time of trial. She also testified that the plants at the top of the hill had been cut and an oak tree removed while her mother owned the property. After that, the property looked much the same as it did at the time of trial.

On cross-examination, Murray-Turner testified that her mother had not intended to steal property.

On the issue of hardship, the Bohbots presented evidence that altering the guest house so that it no longer encroached would present considerable, and expensive, challenges, especially given current set-back requirements. There was also evidence that because the Bohbot property and the upper portion of the Herrera property[2] had been separated only through a deed split, building permits would not be issued unless legal lots had been created.

Trial court findings

The trial court found that the Bohbots had trespassed onto Herrera's property and had destroyed certain trees and landscaping and installed drainage pipes. The court found against the Bohbots on their claim of adverse possession, finding that "the defendants did not occupy the plaintiff's land in an open, notorious and hostile manner." The court quieted title in favor of Herrera and awarded $12,000 in trespass damages and $3,000 in emotional distress damages. After balancing the hardships, the court found that it would be inequitable to require the Bohbots to remove the encroaching utility structure and pool landscaping, and denied the request for an injunction, but ordered that Herrera "may, if he chooses, remove the existing fence and/or place a new fence along the property line established by the Lombera survey." The reporter's transcript establishes that the court specified that while Herrera could move the fence, he could not do so in a manner which forced removal of the guest house or hardscape encroachment.[3]

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[2] That property consisted of two lots.

[3] The court also found against the Bohbots on their claims of prescriptive easement and agreed boundaries, rulings which they do not challenge on appeal.

DISCUSSION[4]

1. Adverse possession

"To establish title by adverse possession, the claimant must establish the following five requirements: 1) Possession under claim of right or color of title; 2) actual, open, and notorious occupation of the premises in such a manner as to constitute reasonable notice to the true owner; 3) possession which is adverse and hostile to the true owner; 4) possession which is uninterrupted and continuous for at least five years; and 5) payment of all taxes assessed against the property during the five-year period. (*Gilardi v. Hallam* (1981) 30 Cal.3d 317, 321; *Kraemer v. Kraemer* (1959) 167 Cal.App.2d 291, 306.)" (*Buic v. Buic* (1992) 5 Cal.App.4th 1600, 1604; Civ. Code, § 325.)

The Bohbots' claim of adverse possession was based on claim of right, rather than color of title, and they were thus required to "make a strong showing of proof on each of the required elements." (*Buic, supra,* at pp. 1604-1605.) "[N]o one should be deprived of his property upon a plea of adverse possession unless such plea is sustained by the clearest and most satisfactory proof." (*Elliott v. Bertsch* (1943) 59 Cal.App.2d 543, 547.)

Here, given the evidence Herrera presented about the age of the fence, and in particular the age of the bowed portion of the fence, the trial court could have (and impliedly did) find that the Bohbots had possessed a portion of the property for less than five years. However, with the uncontradicted evidence that the guest house had been encroaching since the 1950s, the Bohbots proved open and notorious occupation of that part of the encroachment for more than five years. The trial court found, however, that they did not prove that the possession was hostile. The Bohbots contend that the court erred in this finding. We see no error.

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[4] Let us say at the outset that, contrary to the suggestion in the Bohbots' brief, we see no indication in the record that the trial judge was biased against the Bohbots or had a "cavalier approach" to the case.

Adverse possession may be established where the possession is commenced by mistake (*Gilardi v. Hallam, supra,* 30 Cal.3d at p. 322), and that was the situation here. However, possession by mistake is not adverse unless the possessor intends to occupy the land regardless of the true ownership. As we wrote in *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, "[T]he grant of adverse possession or a prescriptive easement requires not innocent intent, but an intent to dispossess the owner of the disputed property, whether the encroacher is acting deliberately or negligently. (*Gilardi v. Hallam* (1981) 30 Cal.3d 317, 321-322.) Indeed, an innocent intent may well preclude a finding of adverse possession or of a prescriptive easement: When the trespasser occupies another's land by mistake, with no intention to claim it as his or her own, and instead claims only to the true property line, then the occupier is not acting with the requisite claim of right. (*Ibid.*)" (*Id*. at p. 770; *Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 940.)

The Bohbots argue that under *Mesnick, infra,* the burden of proof was on Herrera to show that they (the Bohbots) recognized the potential claim and intended not to occupy the land if they did not have title. We do not see that *Mesnick* discussed the burden of proof, or perceive any holding which would contradict the normal rule, which is that the defendant bears the burden of proof on an affirmative defense. (See *McMillian v. Stroud* (2008) 166 Cal.App.4th 692, 701; *U.S. Western Falun Dafa Ass'n. v. Chinese Chamber of Commerce* (2008) 163 Cal.App.4th 590, 599.) In any event, the evidence from both parties constituted substantial evidence for the trial court finding.

If the trial court finds "intent not to claim unowned land," and that finding is supported by substantial evidence, the judgment will be affirmed. (*Mesnick v. Caton* (1986) 183 Cal.App.3d 1248, 1259-1260.) This was the court's finding here. During oral argument on damages, the court several times stated that while the evidence was that the Bohbots had trespassed when they cleared plants from the fence area, they did so "innocently," in the belief that they owned the property.

There was substantial evidence for the finding: Andre Bohbot testified that he did not intend to take property which was not his, and Murray-Turner testified similarly

about the prior owners. Further, in an October 2005 conversation, Andre Bohbot suggested that he and Herrera share the cost of a survey and a new fence, evidencing an intent to claim only what was his.

The case also presents an example of the kind of evidence which could show adverse possession. The evidence that the Bohbots pruned a tree and installed sprinklers after the surveyor set out stakes, and ignored Herrera's certified letters, evidences an intent to occupy regardless of the true ownership of the land. This took place, however, only for that brief period of time. (See *California Maryland Funding, Inc. v. Lowe* (1995) 37 Cal.App.4th 1798, 1806-1807 [hostility demonstrated by defendant's refusal to surrender the property, tossing away for-sale signs, insistence on contesting unlawful detainer actions].)

2. Trespass

Here, the Bohbots argue that the evidence did not support the trial court finding of trespass, or the damages award. They support this argument by citing the evidence in their favor. For instance, the Bohbots cite Murray-Turner's testimony that the top of the hills was cleared before the Bohbots bought the property. She so testified, but Herrera testified to the contrary. The trial court obviously credited Herrera's testimony.

Similarly, while the Bohbots cite the evidence that Herrera built some fencing, and argue that he was responsible for the concrete residue, the trial court obviously chose to believe Herrera's testimony that he did not build near the existing fence and was not responsible for the concrete residue. We need not comment further, because it is not our role to reweigh the evidence.

We find substantial evidence for the judgment in the evidence which Herrera presented concerning the holes in the fence, the drainage pipes, the pruning, and the destroyed vegetation. He did not observe the Bohbots trespass, but, as the trial court noted, he presented a solid circumstantial case. That is sufficient.

Further, there is substantial evidence on damages in Greeley's testimony and her reports, and Herrera's testimony concerning erosion and the jute matting.

Nor do we see error in the exclusion of one of the Bohbots' proposed witnesses at trial. These are the facts: after Greeley testified, the Bohbots sought to call a witness, Robert Wallace, representing that he was an arborist and that he was a rebuttal witness who would impeach Greeley's testimony. Counsel said, "Ms. Greeley testified that she went back on Wednesday and is still of the opinion that the tree is basically of no value, not dead necessarily, but absolutely of no value. Again, the methodology she used to come to that conclusion we assert is the wrong methodology." Counsel represented that Wallace would impeach Greeley on her choice of methodology.

The parties agreed that Wallace had not been identified as an expert during discovery, and the court excluded his testimony on that basis. The Bohbots contend that the court erred in so ruling. We need not consider the contention in much detail, because any error was harmless.

Greeley prepared two reports, both of which were entered into evidence. In the first, dated January 25, 2006, she estimated that corrective measures, including a corrective pruning program for the large oak tree, would cost $10,378. The trial court used this report in calculating damages. In Greeley's second report, dated in May of 2007, she reported that an April 2007 pruning had caused additional damage, so that the tree would have to be replaced at a total cost of $16,500. In determining the amount of damage, she used a method called the Trunk Formula Method. The Bohbots sought to call Wallace to testify that this was not the correct method. However, the court did not award damages based on the second pruning, or the Trunk Formula Method. Any error was harmless.

3. The relative hardship doctrine

"California courts have long applied the relative hardship doctrine in determining whether to grant an injunction to enjoin a trespass by encroachment on another's land." (*Hirshfield v. Schwartz, supra,* 91 Cal.App.4th at p. 758.) The court conducted such an analysis here, and denied Herrera's request for an injunction requiring the Bohbots to move the encroaching structure and concrete hardscape. The Bohbots contend that the

court erred by failing to award them title or an equitable easement to the disputed portion of the land, and that the court "failed to resolve the encroachment issue as no easement was given." They complain that they got no "actual relief."

We read the record differently. Because the parties stipulated to the survey and because the Bohbots did not prevail on their adverse possession claim, the court did not grant them title. However, "When a trial court refuses to enjoin encroachments which trespass on another's land, 'the net effect is a judicially created easement by a sort of non-statutory eminent domain.' (3 Powell, Easements and Licenses, *supra,* § 34.09 at p. 34-101, fn. omitted; 6 Miller & Starr, *supra*, § 15:46, p. 154; see *Field-Escandon*, [1988] 204 Cal.App.3d [228] at pp. 237-238; *Donnell v. Bisso Brothers,* [1970] 10 Cal.App.3d [38] at p. 46.)" (*Hirshfield v. Schwartz, supra,* 91 Cal.App.4th at p. 764.) The trial court thus did grant the Bohbots an easement for the encroaching structure and hardscape.

The Bohbots rely on the next sentence in *Hirshfield*, in which we wrote that "the courts are not limited to judicial passivity as in merely refusing to enjoin an encroachment. Instead, in a proper case, the courts may exercise their equity powers to affirmatively fashion an interest in the owner's land which will protect the encroacher's use." (*Id*. at p. 765.)

From our holding that a trial court has the authority, the Bohbots conclude that the trial court was obliged to exercise that authority by requiring them to pay Herrera the fair market value of the disputed area and awarding them an "actual easement." They ask us to grant them "the requested easement." The difficulty with the argument is that we cannot see that it was raised in the trial court. (*Sea & Sage Audubon Society, Inc. v. Planning Com*. (1983) 34 Cal.3d 412, 417.) We are not cited to any request for a

specific easement. We cannot know what the Bohbots wanted, and thus can find no abuse of discretion in the trial court's failure to grant such an easement.

Disposition

The judgment is affirmed. Respondent to recover costs on appeal.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.